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No. 95-946

In the Supreme Court of the United States

OCTOBER TERM, 1995

DENNIS J. BALDASSARO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Suits in Admiralty Act, 46 U.S.C. App. 741 *et seq.*, waives the United States' sovereign immunity in maritime tort cases that involve discretionary governmental functions.

2. Whether a unionized seaman whose union has negotiated a comprehensive collective bargaining agreement that provides, *inter alia*, for a particular rate of maintenance is entitled to additional payments pursuant to the common law right of maintenance based solely on the claim that the amount denominated in the contract as "maintenance" is inadequate.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 64 F.3d 206. The opinions of the district court (Pet. App. A13-A32) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 1995. A petition for a writ of certiorari was filed on December 13, 1995. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a seaman who, in July, 1991, sustained injuries while working aboard the vessel CAPE CARTHAGE, part of the National Defense

Reserve Fleet. The injury occurred when petitioner was climbing into his upper bunk. Part of a detachable sea rail separated from the bunk frame, causing petitioner to fall to the metal deck floor. Pet. App. A2-A3.

Petitioner filed a personal injury suit against the United States under the War Shipping Administration Act, 50 U.S.C. App. 1291, which is enforceable pursuant to the provisions of the Suits in Admiralty Act, 46 U.S.C. App. 741 *et seq.* He alleged that the failure to use a fixed rail was negligent.[1] Petitioner, who as a member of the Seafarer's International Union had received the daily maintenance benefit of $8 per day that had been negotiated by the union, also claimed that that amount should be augmented because, standing alone, it was insufficient to provide a seaman with food and lodging comparable to that aboard a ship. Pet. App. A3.

2. The district court granted summary judgment for the United States. Applying the Fifth Circuit's holding in *Wiggins* v. *United States*, 799 F.2d 962, 966 (1986), the court held that the waiver of sovereign immunity in the Suits in Admiralty Act is limited by a discretionary function exception. Pet. App. A20-A21. That exception applied to petitioner's claim, the court stated, because the bunk railings on the CAPE CARTHAGE had been designed to be removable, and that design decision had been entrusted to the discretion of the Secretary of Transportation. "In other words," the court stated, "the railing was not 'broken.'" *Id.* at A24. The court also noted the deci-

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[1] Plaintiff conceded that the bunk railing functioned as designed, *i.e.*, that it was designed to be removable. Pet. App. A19.

sion to include the CAPE CARTHAGE in the National Defense Reserve Fleet had also involved the weighing of competing policy considerations. *Id.* at A24-A29.

In a separate order, the district court addressed petitioner's claim that he was entitled to additional maintenance payments. Pet. App. A30-A32. The court recognized both that petitioner, as an injured seaman, was entitled to maintenance payments and that the duty to make such payments lasted until petitioner received "maximum medical cure." *Id.* at A31. However, the court rejected petitioner's claim that he was entitled to maintenance payments in excess of the amount specified in the Seafarer's Welfare Union collective bargaining agreement. The court held that, absent a showing that the United States had abrogated its duty to provide maintenance entirely, petitioner could receive only the maintenance amount that had been contractually agreed upon. *Ibid.*

3. The court of appeals affirmed. Pet. App. A1-A17. The court held, first, that a discretionary function exception to the waiver of sovereign immunity is implicit in the Suits in Admiralty Act. That exception applied to petitioner's claim, the court held, because the decision to equip the CAPE CARTHAGE with detachable sea rails was a discretionary act, and that decision was "susceptible to policy analysis." *Id.* at A12 (italics omitted). "The decision to use detachable sea rails," the court stated, "was but one of myriad details that added up to the total ship design eventually approved by MARAD as an exercise of its discretion in selecting vessels that it determined were of value for national defense." *Id.* at A13. Ac-

cordingly, petitioner's negligence claim was barred. *Id.* at A14.

The court of appeals also rejected petitioner's claim that he was entitled to receive maintenance payments in excess of the amount provided for in the contract. The court recognized that, while the duty of providing maintenance payments "cannot be abrogated, * * * it can be modified and defined by contract." Pet. App. A15. The court declined to disturb the maintenance rate provided in petitioner's union contract. The court relied (*id.* at A16) primarily upon the Ninth Circuit's decision in *Gardiner* v. *Sea-Land Serv., Inc.*, 786 F.2d 943, cert. denied, 479 U.S. 924 (1986), which held that when a benefits package in a collective bargaining agreement expressly provides for a precise rate of maintenance, the adequacy of that rate, considered in isolation, "is not a subject for judicial speculation when the rate is part of a total package of wages and benefits resulting from the process of collective bargaining." 786 F.2d at 949. As had the Ninth Circuit in *Gardiner*, see *ibid.*, the court of appeals distinguished the situation of nonunion seamen, to whom, the court noted, it had awarded rates of maintenance that exceeded the $8 daily payment provided by petitioner's union contract. Pet. App. A16-A17 & n.37 (citing *Morel* v. *Sabine Towing & Transp. Co.*, 669 F.2d 345 (5th Cir. 1982) ($20/day awarded); *Caulfield* v. *AC & D Marine, Inc.*, 633 F.2d 1129 (5th Cir. 1981) ($15/day awarded)).

In drawing that distinction, the court of appeals agreed with the Ninth Circuit that, because "Congress viewed collective bargaining as a key instrument in its effort to promote industrial peace," courts should not "lightly embrace the repudiation of contractual obligations enumerated in a collective bar-

gaining agreement," but should instead "choose the rule that will promote the enforcement of collective bargaining agreements." Pet. App. A16 (quoting *Gardiner*, 786 F.2d at 948). The court also noted (Pet. App. A16) that, as in *Gardiner*, petitioner had not alleged either that the collective bargaining agreement as a whole was unfair or that he had been inadequately represented by the union. Thus, the court stated, "[t]he adequacy of the maintenance rate should not be examined in isolation by the court because the determination of its adequacy in relation to the whole scheme of benefits has already been made by the union and the seamen who voted for the contract." *Ibid.* (quoting *Gardiner*, 786 F.2d at 949).

ARGUMENT

1. Under the Federal Tort Claims Act (FTCA), ch. 646, 62 Stat. 984, 28 U.S.C. 2671 *et seq.*, the United States has generally waived sovereign immunity in tort suits, subject to certain exceptions. One exception is for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a). See *United States* v. *Gaubert*, 499 U.S. 315, 324 (1991). The Suits in Admiralty Act was amended in 1960 to include matters that did not involve government vessels or cargo but that would be within the admiralty jurisdiction if private parties were involved. The discretionary function exception had regularly been applied before that time in FTCA cases within the federal courts' admiralty jurisdiction. See, *e.g.*, *Kline* v. *United States*, 113 F. Supp. 298 (S.D. Tex. 1953); *Westchester Fire Ins. Co.* v.

Farrell's Dock & Terminal Co., 152 F. Supp. 97, 98 (D. Mass. 1957).

As petitioner notes (Pet. 2-9), the Suits in Admiralty Act does not contain an express exception for tort claims arising out of the exercise of discretionary governmental functions. But, as all eight courts of appeals to address the issue have held, there is no basis for concluding that Congress intended to remove the discretionary function exception (and *sub silentio*, to subject the government to expanded tort liability) when it transferred certain maritime tort actions from the FTCA to the Suits in Admiralty Act.[2] On the contrary, the legislative history demonstrates that the amendment was intended to remove the confusion concerning the respective jurisdictions

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[2] See, *e.g.*, *Chute* v. *United States*, 610 F.2d. 7 (1st Cir. 1979), cert. denied, 446 U.S. 936 (1980); *In re Joint E. & S. Dists. Asbestos Litig.*, 891 F.2d 31, 35 (2d Cir. 1989); *Sea-Land Serv. Inc.* v. *United States*, 919 F.2d 888, 891 (3d Cir. 1990), cert. denied, 500 U.S. 9411 (1991); *Wiggins* v. *United States*, 799 F.2d 962, 964 (5th Cir. 1986); *Gordon* v. *Lykes Bros. S.S. Co.*, 835 F.2d 96 (5th Cir.), cert. denied, 488 U.S. 825 (1988); *Gemp* v. *United States*, 684 F.2d 404 (6th Cir. 1982); *Estate of Callas* v. *United States*, 682 F.2d 613 (7th Cir. 1982); *Bearce* v. *United States*, 614 F.2d 556 (7th Cir.), cert. denied, 449 U.S. 837 (1980); *Earles* v. *United States*, 935 F.2d 1028, 1032 (9th Cir. 1991); *Williams* v. *United States*, 747 F.2d. 700 (11th Cir. 1984); *United Fire Ins. Co.* v. *United States*, 806 F.2d 1529, 1535 (11th Cir. 1986); *Canadian Transp. Co.* v. *United States*, 663 F.2d 1081, 1085 (D.C. Cir. 1980). The Fourth Circuit initially took the contrary view, see *Lane* v. *United States*, 529 F.2d 175 (4th Cir. 1975), but later joined the other circuits in finding that there is a discretionary function exception under the Suits in Admiralty Act. See *Faust* v. *South Carolina State Highway Dep't*, 721 F.2d 934, 938-939 (4th Cir. 1983), cert. denied, 467 U.S. 1226 (1984); *Tiffany* v. *United States*, 931 F.2d 271, 277 (4th Cir. 1991), cert. denied, 502 U.S. 1030 (1992).

of the federal district courts and the Court of Claims. See S. Rep. No. 1894, 86th Cong., 2d Sess. 6 (1960); see also *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 175-176 (1976) ("It was the difficulty in determining the appropriate forum for a maritime claim against the United States that moved Congress to amend the Suits in Admiralty Act in 1960.").

Indeed, as this Court has noted, the discretionary function exception itself was drafted merely as a "clarifying amendment" to the FTCA, *Dalehite* v. *United States*, 346 U.S. 15, 26 (1953), because Congress "believed that claims of the kind embraced by the discretionary function exception would have been exempted from the waiver of sovereign immunity by judicial construction." *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 810 (1984). As the Second Circuit has noted, "[w]ere we to find the discretionary function exception not to be applicable to the [Suits in Admiralty Act], we would subject 'all administrative and legislative decisions concerning the public interest in maritime matters . . . to independent judicial review in the not unlikely event that the implementation of those policy judgments were to cause private injuries' * * *. Such an outcome is intolerable under our constitutional system of separation of powers." *In re Joint E. & S. Dist. Asbestos Litig.*, 891 F.2d at 35 (citations omitted). See *United States* v. *Muniz*, 374 U.S. 150, 163 (1963) (noting that the discretionary function exception insulates the government from "liability that would seriously handicap efficient government operations").

2. Petitioner also claims (Pet. 9-15) that the court of appeals erred in holding that he was not entitled to augment the maintenance rate set in his union contract.[3] That decision was correct, although, as the court of appeals recognized (Pet. App. A15), it conflicts with the decision of the Third Circuit in *Barnes* v. *Andover Co.*, 900 F.2d 630 (1990). Certiorari is, however, not warranted at this time.

a. As this Court has long recognized, the historic right of an injured seaman to maintenance is a contractual right implied by law. As this Court has explained:

> Among the most pervasive incidents of the responsibility anciently imposed upon a shipowner for the health and security of sailors was liability for the maintenance and cure of seamen becoming ill or injured during the period of their service. In the United States this obligation has been recognized consistently as an implied provision in contracts of maritime employment.

Aguilar v. *Standard Oil Co. of New Jersey*, 318 U.S. 724, 730 (1943). This Court has stated, in dicta, that "no agreement is competent to abrogate the * * * [seaman's right] to * * * maintenance and cure." *Cortes* v. *Baltimore Insular Line, Inc.*, 287 U.S. 367, 371 (1932); *De Zon* v. *American President Lines, Ltd.*, 318 U.S. 660, 667 (1943).

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[3] Maintenance is the living allowance for a seaman while he is ashore recovering from injury or illness. See *Vaughan* v. *Atkinson*, 369 U.S. 527, 531 (1962). Cure is the payment of medical expenses involved in treating the seaman's injury or illness. See *Calmar S.S. Corp.* v. *Taylor*, 303 U.S. 525, 528 (1938).

The Court, however, has never held that the injured seaman's right to maintenance must take a particular form, or that the amount of maintenance payments to which a seaman is entitled may not be defined by the process of bargaining. Compare *Johansen* v. *United States*, 343 U.S. 427, 428, 432-433 (1952) (holding that federal civil-servant seamen's common law rights of maintenance, cure, wages, and damages were wholly supplanted by the Federal Employees Compensation Act, 5 U.S.C. 751, and its "comprehensive compensation system"). Indeed, with the exception of the Third Circuit, every court of appeals to address the issue has held that the amount or form that a maintenance payment will take is an appropriate subject of collective bargaining between the seaman's union representatives and the shipowner, and that there is no basis for a court to inquire into the adequacy, considered in isolation, of a collectively bargained maintenance rate. See Pet. App. A16; *Macedo* v. *F/V PAUL AND MICHELLE*, 868 F.2d 519 (1st Cir. 1989); *Al-Zawkari* v. *American S.S. Co.*, 871 F.2d 585 (6th Cir. 1989); *Gardiner* v. *Sea-Land Serv. Inc.*, *supra*; see also *Dixon* v. *Maritime Overseas Corp.*, 490 F. Supp. 1191, 1193 (S.D.N.Y.), aff'd, 646 F.2d 560 (2d Cir. 1980) (table), cert. denied, 454 U.S. 838 (1981); cf. *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 246-248 (1942) (seamen may execute release of maintenance right where shipowner shows it was fairly bargained).

Enforcing the terms of a seaman's collectively bargained agreement vindicates the strong public policy in favor of collective bargaining. As the court of appeals for the Ninth Circuit has stated:

Important public policies support the enforceability of the maintenance rate involved in this case * * *. Congress viewed collective bargaining as a key instrument in its effort to promote industrial peace. Our national labor policy is built on the premise that employees can bargain most effectively for improvements in wages, hours, and working conditions by pooling their economic strength and acting through freely chosen labor organizations. Consequently, this court will not lightly embrace the repudiation of contractual obligations enumerated in a collective bargaining agreement and will choose the rule that will promote the enforcement of collective bargaining agreements. Although the right to maintenance is presumed to exist because of its establishment at common law, its rate may be subject to the negotiation process. The collective bargaining agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant. * * *

Here, the parties to the agreement included the traditional right to maintenance as a subject of the negotiating process. The resulting collective bargaining agreement incorporated an explicit rate of maintenance as one of its terms. We cannot fairly say that this rate, as a consequence of the normal "give and take" process of collective bargaining, is not entitled to the same reliability accorded to other terms and conditions within the same agreement. The national labor policy of promoting and encouraging collective bargaining

> agreements would be unduly compromised were we to conclude otherwise.

Gardiner, 786 F.2d at 948-949 (citations and internal quotation marks omitted).

Enforcing a collectively-bargained maintenance rate also recognizes that such a rate is often not negotiated in isolation, but in conjunction with the other terms of the agreement, including terms that, while not denominated "maintenance" as such, similarly serve to assist the injured seaman. "The rate of maintenance is but one of many elements contained within the Union contract and over which the parties negotiate, and there may be a considerable amount of 'give and take' exercised by the parties in coming to a final agreement on all of the elements." *Grove* v. *Dixie Carriers, Inc.*, 553 F. Supp. 777, 780 (E.D. La. 1982). Such negotiated terms may include disability benefits, pension fund contributions, and provisions for travel home from the site of the injury, all of which assist the injured seaman; other benefits may include health insurance, the particular wage rate, overtime, premium and penalty pay for unpleasant tasks, and vacation allowances. See *Gardiner*, 786 F.2d at 949; *Macedo*, 868 F.2d at 521; *Barnes*, 900 F.2d at 637. Allowing a party to challenge the adequacy of one term in a multi-dimensional contract would undercut the collective-bargaining process, and discourage the parties from bargaining in the future over that term. Where the parties have specifically included a liquidated maintenance rate in the contract as part of a negotiated package of benefits and other terms of employment, it is therefore reasonable to bind bargaining unit members to the maintenance rate provided in the collective bargaining agreement.

See *Gardiner*, 786 F.2d at 949; *Al-Zawkari*, 871 F.2d at 588; *Macedo*, 868 F.2d at 521-522 ("we see no basis for making this single change in what had been recognized as a unified whole").

Finally, honoring the liquidated maintenance rate set in a collectively bargained contract reflects the fact that a seaman who is represented by a union presumably enjoys greater protection in the contract-negotiation process than did the paradigmatic "wards of the admiralty," *Garrett*, 317 U.S. at 246, whom the common law sought to protect. See *Macedo*, 868 F.2d at 522. As Justice Story explained in 1823, the solicitude with which admiralty traditionally viewed seamen's contracts stemmed from a recognition that seamen held inferior bargaining power relative to shipowners:

> They are emphatically the wards of the admiralty; and though not technically incapable of entering into a valid contract, they are treated in the same manner as courts of equity are accustomed to treat young heirs, dealing with their expectancies, wards with their guardians, and *cestuis qui trustent* with their trustees . . . . If there is any undue inequality in the terms, any disproportion in the bargain, any sacrifice of rights on one side, which are not compensated by extraordinary benefits on the other, the judicial interpretation of the transaction is that the bargain is unjust and unreasonable, that advantage has been taken of the situation of the weaker party, and that *pro tanto* the bargain ought to be set aside as inequitable."

Harden v. *Gordon*, 11 Fed. Cas. 480, 485 (C.C. D. Me. 1823) (No. 6047) (Story, J.) (quoted in *Garrett*, 317 U.S. at 246-247). This Court thus held in *Garrett*

that, while a seaman may execute a release of his right to maintenance, the shipowner bears the burden of establishing that the release "was executed freely, without deception or coercion, and that it was made by the seaman with full understanding of his rights." 317 U.S. at 248.

The court of appeals below recognized (Pet. App. A16) that, even in the collective-bargaining context, a seaman retains the right to claim that the collective-bargaining agreement as a whole is unfair or that he was not adequately represented by the union. See *Gardiner*, 786 F.2d at 949 (enforcing contractual maintenance rate where "there has been no allegation that the collective-bargaining agreement as a whole is unfair or inadequate"). Petitioner, however, did not make either of those claims. Pet. App. A16. The court of appeals was therefore correct to reject his challenge to the maintenance provision of his union-negotiated contract.[4]

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[4] Petitioner's union contract is not part of the record below. However, our review of the contract that the Seafarer's International Union entered into with its various contracted companies, including the American Overseas Marine Corp., the entity whom the United States engaged to staff and to operate the CAPE CARTHAGE, indicates that the company, as the shipowner's agent, is obliged, *inter alia*, (1) to contribute to the union's pension and welfare plans, which provide, among other things, for permanent disability benefits; and (2) to provide for repatriation, upkeep, and transportation when a crew member leaves a vessel as a result of injury or illness. In addition, the contract leaves undisturbed, and indeed recognizes, the right of an injured seaman to unearned wages for the duration of the voyage for which he was hired. See *Farrell* v. *United States*, 336 U.S. 511, 519-521 (1949); *Blainey* v. *American S.S. Co.*, 990 F.2d 885, 887 (6th Cir.), cert. denied, 114 S. Ct. 346 (1995).

b. In *Barnes*, a divided panel of the Third Circuit held that the $8 daily maintenance rate provided in a collective bargaining agreement did not bind a seaman. The panel majority recognized that the rationale for imposing a duty of maintenance on shipowners had been undercut by "[t]he changed circumstances of the unionized seaman." 900 F.2d at 637. Unlike traditional seamen, the majority noted, "today those seamen who are unionized are neither friendless nor improvident," *id.* at 636, and often enjoy numerous contractual benefits. *Id.* at 637. In addition, the majority recognized, while "the adjectives 'friendless' and 'helpless' were generally used to describe sailors in foreign ports[,] [n]ow under union contracts ill or injured seamen are quickly repatriated." *Ibid.*

The *Barnes* majority stated, however, that it would not depart from the practice of treating maintenance as a seaman's right, because the Supreme Court "has shown no inclination to depart from its long-established solicitude for seamen," 900 F.3d at 637, and because Congress had not preempted maintenance rights in enacting the labor laws. *Id.* at 637-639. Absent a change in this Court's approach to a seaman's right to maintenance, the majority stated, "we see no basis to assume that the emergence of powerful seamen's unions, a development concerning which the Court has full knowledge, justifies our ignoring the Court's clear and frequent pronouncements that seamen remain wards of the admiralty." *Id.* at 637 (citations omitted). While the *Barnes* majority stated that it was "sympathetic with an approach that would encourage the use and reliability of collective bargaining agreements" as the means of fixing the amount of maintenance, *id.* at 640, it knew "of no basis for permitting such contracts to override a common

law maritime right of a seaman that has not been preempted" by Congress. *Ibid.* The majority accordingly held that where a seaman can establish that a contractual rate of maintenance is itself inadequate to meet his food and lodging needs, the seaman is entitled to augmentation of that rate. *Ibid.* The dissenting judge in *Barnes* agreed with the First, Sixth, and Ninth Circuits that "in the collective bargaining context the common law right of maintenance can be measured by an agreement between the employer and the duly-chosen collective bargaining representative of the employees who possess the right." *Id.* at 645 (Lifland, D.J., dissenting).

In our view, the panel majority in *Barnes* erred in relying solely on the facts that Congress has not preempted, and that this Court has not repudiated, a seaman's right to maintenance in the collective-bargaining context. Although the right to maintenance continues to exist in the collective-bargaining context, seamen may, though their union, relinquish part of that right in return for other benefits such as those provided by a collective-bargaining agreement. Compare *Garrett*, 317 U.S. at 248 (seaman may knowingly relinquish right to maintenance in return for a stated sum).[5] Thus, as the court of appeals recognized in this case (Pet. App. A16), the issue, where a collective bargaining agreement has provided for a rate of maintenance below

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[5] Thus, the issue is not whether the duty has been "abrogated," see *De Zon*, 318 U.S. at 667, relied upon by the panel majority in *Barnes*, 909 F.2d at 637. Rather, the issue is whether the amount of maintenance has been set pursuant to an understanding fairly bargained between the parties. See Pet. App. A15.

that to which a seaman would ordinarily be entitled, is not the adequacy of the maintenance rate, but whether the seaman was adequately represented by the union and whether the agreement as a whole was unfair.

c. Although the decision below conflicts with the decision of the Third Circuit panel in *Barnes*, we do not believe that review of that question is warranted at this time. That question arises infrequently, and no other court of appeals has, as yet, agreed with the Third Circuit's decision. In the event that other circuits have occasion to address that issue and reach the result reached by the First, Fifth, Sixth, and Ninth Circuits, the Third Circuit may revisit and overrule the decision of its divided panel in *Barnes*, thus obviating the existing conflict. Indeed, even the panel majority in *Barnes* recognized that the historic rationales for allowing a court to set the maintenance rate payable to an injured seaman do not apply where a maintenance rate has been set in a collectively bargained agreement that is, on the whole, fair. 900 F.2d at 637.[6] In the event that the Third Circuit

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[6] In awarding maintenance at a rate exceeding the contractual rate, the district court in *Barnes* had relied on the fact that "there was no evidence that the rate of maintenance had been an actual subject of bargaining between the union and the shipowners." 900 F.2d at 633. Although the Third Circuit panel did not rely on that finding, it may be significant that no such finding had been made in the other four cases to address the question presented by petitioner. Compare *Gardiner*, 786 F.2d at 949 (noting that "there was real bargaining over the maintenance rate"). *Barnes* also relied, in part, on the shipowner's concession in that case that a union could not reduce the maintenance right to as low as $2 a day, regardless of other contractual benefits belonging to the injured seaman, because that sum would amount to "abrogation" of the maintenance

adheres to the approach taken in *Barnes*, there will be ample opportunity for this Court to review the question presented at that time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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right. See 900 F.2d at 637 (stating that court failed to see why $2/day rate represents abrogation any more than $8/day, in that both rates were below the seaman's daily needs). The government has not made any such concession in this case.